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The humiliation of the state as a constitutional tactic

Gareth Davies

1. INTRODUCTION

Constitutions have two major functions. They determine the structure and functioning of the institutions of public authority, and they regulate the relationship between that authority and its subjects. The crisis of European constitutionalism is primarily about the second of these functions. The EU has not made the connection with citizens that is necessary for a satisfying level of legitimacy and for confidence about its future. Citizens remain distinctly half-hearted in their acceptance of and enthusiasm for the EU. One might speak of a 'crisis of commitment'.

Overcoming this crisis entails improving the EU-citizen bond. However, this is a complex process. A distinctive aspect of the EU-citizen relationship is that it is not independent of the parallel relationships found within the Member States. The degree and nature of the bond between citizen and EU is influenced by the degree and nature of the bond between citizen and state, sometimes in intricate and indirect ways. The EU cannot work on its relationships in isolation.

The most obvious response to this situation might be for the EU to try to improve feeling on all sides of the EU-citizen-national government triangle, to strengthen the governmental system of Europe generally. However, less generous and more cynical tactics may also appeal. Pushing the citizen closer to the EU might be achieved by pulling the citizen further away from the state. The EU might seek to undermine the citizen-state relationship in order to create a constitutional space that it can occupy. To win the citizen away, it might humiliate the state. If the parallel EU and national citizenships are seen in competition, with citizens having a limited fund of loyalty or commitment, such an approach would make sense.

No European institution or servant would admit to this method, of course. However, the EU's most profound constitutional acts and effects to date may be seen in this light: what they amount to collectively is a systematic and challenging intervention in the citizen-state relationship, and implicitly and indirectly also in the citizen-citizen relationship. Repeatedly and consistently, the EU, in particular its Court of Justice, diminishes the power, status, and capacity of the states in the eyes of its citizens, as if to say 'See? The state cannot look after you any more. You need the EU'. This chapter looks at three situations that are examples of this. Firstly, the specialness of national citizenship is examined, and the way in which the law, in the hands of the Court, takes this specialness away. The assimilation of migrant EU citizens to nationals means that our claim to a unique and

preferential relationship with our state is almost destroyed. If our own state cannot prize us above others, what then is the basis of our loyalty to it? Secondly, the Court has reduced the respect that national laws traditionally require us to accord public institutions. We have, thanks to EU law, greater rights to stand up to national laws and bodies that deny us our preferences. Is this elevation of the individual an inducement to contempt for the state? Thirdly, the Court and the law tell us that we do not have to be part of our state and its systems. The national community of fate becomes a community of voluntary membership. We may go wherever we like, and join the state of our choice. Are citizens to become increasingly picky customers in a marketplace for nations, asking not what we can offer our country but what each country can offer us?

2. Second-class citizens

Rights for migrants

Where the EU speaks to individuals, it does so initially, and most fundamentally, if they are migrants. What the Court of Justice describes as the 'fundamental freedoms' of the Treaties are rights awarded to those who engage in cross-border activities, and in particular to those who travel to or live in states other than their state of nationality.[1] These individuals are granted the rights to live, work,

1 See e.g. most recently ECJ, Case C-151/07 *Theologos-Grigorios Chatzithanasis* v. *Ypourgos Ygeias kai Koinonikis Allilengyis and Organismos Epangelmatikis Ekpaidefsis kai*

and study in their host state, to be treated equally to nationals, and to bring their families with them.[2]

These are rights of great importance to those who benefit from them, but they continue to be exercised by a relatively small group of people. Moreover, they do not at first glance seem to threaten the established constitutional order or the special status of the national citizen. Firstly, the most basic of citizenship rights, the right to vote in national elections, is not included, nor are sensitive functions such as those in the military or official positions.[3] The citizen is still demarcated as a person possessing exclusive local privileges. Secondly, there is no natural constitutional objection to *noblesse oblige*. Extending hospitality to a guest, treating him or her as you would your own family, does not in itself pose a threat to the relationships within that family, at least as long as there are not too many guests staying for too long a period – which in the case of free movement is not yet the situation.

In fact, insofar as citizen loyalty depends upon a perception of the

Katartisis (OEEK) [2008] *ECR* NYP; ECJ, Case C-158/07 *Jacqueline Förster* v. *Hoofddirectie van de Informatie Beheer Groep* [2008] *ECR* NYP; ECJ, Case C-127/08 *Blaise Baheten Metock and Others* v. *Minister for Justice, Equality and Law Reform* [2008] *ECR* I-6241.

2 See Arts. 12, 17, 18, 39 EC; Directive 2004/38 on the right of citizens of the Union and their families to move and reside freely within the territory of the Member States [2004] OJ L 158/77 of 30 April 2004.

3 Art. 19 EC; Art. 39(4) EC; ECJ, Case 149/79 *Commission* v. *Belgium* [1980] *ECR* 3881; O'Keeffe, 'Judicial interpretation of the public service exception to the free movement of workers', in D. Curtin and D. O'Keeffe, eds., *Constitutional Adjudication in European Community and National Law* (Dublin, Butterworths 1992) p. 89.

state as benevolent and protective, this image may well be protected by generous and equal treatment of the outsider. Just as the argument 'it may be me tomorrow' is used as a reason to object to the persecution of others, the perception that all persons within the state are well treated may be comforting even to the individual who does not yet feel in any sense excluded. It is evidence of the decency of public authority.

A simple assimilatory reading of free movement rights does not therefore undermine the citizen-state bond. It may require some adaption of the national legal order, but this adaption need not be experienced by either citizen or state as threatening the essence of their relationship to each other.

Substantive equality and beyond

The assimilatory reading mentioned above assumed that equality entails identical treatment. The foreigner is granted the right to do as the locals do and to be treated as they are treated. However, uniform treatment can in fact lead to a systematic disadvantaging of some groups, and in the case of free movement this is true for foreigners. The standards and requirements that national rules embody are typically based upon local norms and habits, and so are either harder for foreigners to meet, or they impose unreasonable demands upon

them.[4] Hence where a rule, even one formally blind to nationality, in fact works to exclude the foreigner, EU law demands that it be questioned. Is it based on objectively justifiable criteria? If so, the exclusionary effect may have to be accepted.[5] For example, a rule that schoolteachers must speak the local language puts millions of potential migrant workers at a disadvantage, but is nevertheless obviously perfectly sensible.[6] The language criterion is justifiable for the function rather than a proxy for nationality. By contrast, a language criterion for some other functions – for example a university researcher in international law – might not have sufficient justification, from which the rational conclusion would be that it was simply a way of indirectly excluding foreigners.

The right of EU migrants to equal treatment entails a prohibition on indirect discrimination on grounds of nationality, as well as on direct, or explicit, discrimination.[7] This indirect discrimination ban can have surprising effects, as in *Garcia Avello* v. *Belgian State*.[8] In this instance, a Spanish-Belgian couple wished to register their children in Belgium with the name Garcia Weber, derived from the surnames of the father and the mother combined, as is the Spanish custom, and as the children were already registered with the Spanish authorities. The

4 G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague, Kluwer Law International 2003) p. 43-44.
5 ECJ, Case C-237/94 *John O'Flynn* v. *Adjudication Officer* [1996] *ECR* I-2617.
6 ECJ, Case 379/87 *Anita Groener* v. *Minister for Education and the City of Dublin Vocational Educational Committee* [1989] *ECR* 3967.
7 See *supra* n. 5.

children had dual nationality. However, the situation was complicated by the fact that the children's birth certificates bore the surname of their father, Garcia Avello, as Belgian law provided that Belgian children must take the name of their father – subject to certain exceptions not relevant here. The couple was therefore asking for their children's Belgian names to be changed to match their Spanish names. As well as having the rule that children take their father's name, Belgian law frowned upon name changes, allowing them only in exceptional circumstances.

It is therefore unsurprising that the Belgian authorities refused the request. However, Mr. Garcia Avello, the Spanish half of the couple, claimed that this amounted to indirect discrimination on grounds of nationality, from which as a migrant European citizen he was entitled to protection. He relied on Art. 17 EC, which declares EU citizenship to be possessed by all citizens of the Member States, and on Art. 12 EC, which prohibits discrimination on grounds of nationality, and applies to all situations falling within EC law.[9]

The Court agreed with Mr. Garcia Avello that the Belgian practice amounted to prohibited discrimination on the basis of nationality. The

8 ECJ, Case C-148/02 *Carlos Garcia Avello* v. *Belgian State* [2003] *ECR* I-11613.

9 Art. 17 provides that '(1) Citizenship of the Union is hereby established. Every person holding the nationality of member state shall be a citizen of the union. Citizenship of the union shall complement and not replace national citizenship. (2) Citizens of the union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby'. Art. 12 provides 'within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited….'

Belgian rules clearly created particular disadvantages for those Belgians who were also Spanish, and there was no adequate justification. The judgment turned on the principle of the 'immutability' of surnames, since it was in fact a name change that was being requested. The Belgian state claimed that such immutability was an essential principle of social order, which prevented confusion about identity. They also argued that the rule that children take their father's name served a similar function, and allowing the change requested would undermine this and create confusion about their paternity. The Court did not address this argument as such but implicitly rejected it.

For the Garcia Avello-Weber family, this was a welcome judgment, but there will be few people in their position. For most Belgians, the position is entirely unchanged. Yet this is precisely the significance of the case. This judgment divides Belgians into groups with different rights: those with dual nationality, such as the Avello-Weber children, who can use EU law to assert particular naming rights, and others, who cannot, and must take only their father's name.

The arguments for the necessity of the patrilineal naming practice, and for the importance of immutable names, border on the laughable – although the Advocate General was notably careful to treat them with apparent respect even while he dismissed them.[10] It is clearly not the

10 See Advocate General Jacobs in *Garcia Avello*, *supra* n. 8, paras. 70-75.

case that the Belgian social order would collapse if parents could choose whether children took their father's or their mother's name, or even a combination. Nor would Belgian integrity be directly threatened by more flexibility concerning name changes. As the Advocate General indicated, many lands are quite flexible about such things and without obvious consequences.[11] Yet another part of the case hints at a different kind of reason for the Belgian intransigence. According to Belgian law, Belgians with dual nationality were treated, within Belgium, as exclusively Belgian. In general, no account could be taken of their other nationality.

Such a rule is really one of equality. All Belgians are to be treated alike by the Belgian state. It is a classical republican approach to the equality of citizens, in which the state is blind to the differences between them.[12] In many ways, this protects religious or racial or other minorities, who cannot be in any way explicitly singled out or diminished. However, as the case shows, it can in fact work indirectly to disadvantage such groups, by making the state unable to take into account their particular and atypical circumstances. Most Belgians experience no discomfort with respect to the naming rules. Those who may have real practical problems because of dual nationality find that

11 Ibid., paras. 6-18, and paras. 70-75.

12 See e.g. E.T. Beller, 'The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society', 39 *Tex. Int'l L.J.* (2004) p. 581; T. Jeremy Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France', *BYU Law Review* (2004) p. 419; M. Mahlmann, 'Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case', 4 *GLJ* (2003) p. 1099.

the state is deaf to them, as a matter of principle.

The rule therefore appears to limit the capacity of the state to respond intelligently to the life circumstances of its citizens, and from the most immediate policy perspectives is just silly. Its justification, however, lies in a broader conception of society as one in which divisions between citizens attack the very heart of a cohesive social order, and a state that may target its acts towards specific groups is a threat to individual liberty. Many states have naming rules similar to those of Belgium,[13] and there are many other apparently pointlessly strict and formalistic administrative rules that serve the same goal of creating uniformity as such.[14] The traditional European concept of citizenship is closer to the Belgian one, in which the uniqueness of individual citizens is ignored, rather than to the Court of Justice's demand that such uniqueness be respected.

One might therefore say, perhaps with some dramatic licence, that the Court in *Garcia Avello* takes a step towards reversing the French Revolution – one of the sources of the traditional notion of citizenship – and introducing a different concept of national membership, in which the state is obliged to treat each individual on his or her own terms insofar as this is practically possible. However, within the current state of the law, individuals who can assert that right to

13 See s*upra* n. 10.

14 G. Davies, 'Bureaucracy and free movement: A conflict of form and substance', *NtEr* (2003) p. 81.

individual treatment are only those with a cross-border connection. Mr. Garcia Avello benefits, and so can any other Belgian with a special connection to another country and who finds that personalised treatment would be more to his or her taste. However, those Belgians who stay at home and have no such argument become a second-class group. They may also find the law an ass at times, but because their problems are not connected with EU law they have no status to object.

The facts in *Garcia Avello* are unusual, and more commonly it is a non-national that objects to local law. It is also often the case that the question of discrimination is not raised. The Treaty does protect migrants from discrimination, but it also grants them rights to work and live in other states, and the simplest objection to national law is that it obstructs the exercise of these rights. A national measure that does this is contrary to the Treaty unless it can be shown to be necessary for a specific legitimate goal.[15]

Migrants objecting to national laws on the grounds that they obstruct free movement have led to judgments as divisive and quietly radical as *Garcia Avello*. Consider, for example, the astonishing *Vlassopoulou*.[16] This case concerned a Greek lawyer who moved to

15 See ECJ, Case C-413/99 *Baumbast and R* v. *Secretary of State for the Home Department* [2002] *ECR* I-7091; ECJ, Case C-415/93 *Union royale belge des sociétés de football association ASBL* v. *Jean-Marc Bosman, Royal club liégeois SA* v. *Jean-Marc Bosman and others and Union des associations européennes de football (UEFA)* v. *Jean-Marc Bosman* [1995] *ECR* I-4921.

16 ECJ, Case 340/89 *Vlassopoulou* v. *Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] *ECR* 2357.

Germany, obtained a doctorate (in German, on German law, *magna cum laude*), and began to work for a German law firm. She specialised in Greek and European law, and whenever German law was involved she worked under the supervision of a German lawyer.

Five years after starting this job, and ten years after coming to Germany, she applied to the German legal authorities to be entered on the register of German lawyers. She was refused, however, because she did not have the required qualifications – an undergraduate degree in German law. She claimed that this refusal hindered her freedom of establishment, and was contrary to EU law.

The Court agreed. It found that the obligation to allow foreign nationals to establish themselves as, for example, lawyers meant that the German authorities had to take a different approach. They should have first looked at the qualifications Ms Vlassopoulou had obtained in Greece to see how much overlap there was with local qualifications. That would have been considerable, since modern Greek law is based on German law. Then they should have looked at her other qualifications, such as the PhD, to see what knowledge she had obtained. Subsequently, they should have taken into account the experience she had acquired in practice as well as the knowledge she was likely to have gained from this, before making an overall assessment of whether her level of knowledge of German law was up to that of a newly minted German graduate, or whether there were specific gaps, which it was then reasonable to ask her to fill by means

of a period of supervised work or perhaps an exam. The word was not used, perhaps because the case is not very recent, but if it were being decided now, the Court would undoubtedly say that the simple rejection of Ms Vlassopoulou's application was disproportionate.

If the only question were whether Ms Vlassopoulou was fit to practice, then this was a very sensible approach. No-one who has taught at a university can doubt that after her various experiences Ms Vlassopoulou will have been far better able to practice than the average new graduate, not only with a better knowledge and understanding of German law but also with a better understanding and insight into her own gaps in knowledge. She will have been a less dangerous lawyer than the graduate who may be under the illusion that he or she has at last a thorough grasp of the system.

However, consider the position of a German citizen who, as a result of various experiences, has picked up an impressive knowledge of law. Would he or she be able to excuse him- or herself from professional training? Could it be argued that a degree in dentistry provides an understanding of the obligations of professional work, a cum laude graduation demonstrates intelligence, and a PhD in orthodontics and patient satisfaction has given a good knowledge of tort law, while ten years working as an advisor to personal injury lawyers means that he or she now has as solid a grasp of the local law and legal system as a fresh graduate? On the facts, such an argument may be convincing, but it would probably not be accepted. Even a less far-fetched case,

one more similar to Ms Vlassopoulou's, would be unlikely to succeed. If a German citizen had studied philosophy before doing a doctorate in law and then serving as a legal advisor for years, he or she would still have a request for registration as a lawyer rejected on the grounds that he or she did not have a law degree.

There are good reasons of practice and principle for states to expect citizens to adapt and conform to rules in many areas, even if these rules are sometimes under- or over-inclusive and make the atypical citizen jump through apparently unnecessary hoops. Rules are clear and transparent, and as a result give confidence to the public and authority to those who conform to them, while minimising disputes. There would be a number of practical and legal problems if the bar were open to all those who could provide objective evidence of legal knowledge. States require specific qualifications in order to avoid the problems of policing and uncertainty associated with such an open-ended approach. Yet it now seems that the position has changed for migrants. Where they are concerned, by contrast, it is for the state to adapt to their personal circumstances. Unlike locals, migrants can state the facts of their position and expect local rules to fit around them.

This undermines one of the most fundamental elements of citizenship:

the notion that one is a member of the most privileged legal group.[17] It is often said that citizenship cannot accommodate the idea of the second-class citizen – everyone must be equal. *Garcia Avello* confronts this. A fortiori, the citizen must not be worse off than the non-citizen, or the essential promise that citizenship contains – you are the person that the state exists to serve – is made hollow. One may see citizenship as containing a 'most favoured person' guarantee. *Vlassopoulou* nullifies this guarantee, as do other cases that grant substantive rights to non-citizens and that go beyond formal equality, giving them extra rights.

The citizenship directive is in fact the greatest source of such nullification. The primary example is the promise that non-citizens may bring their families to live with them, whatever the nationality of those family members.[18] The Belgian in Denmark may bring his or her non-European partner and children to Denmark without further ado, while the Dane has to comply with Danish immigration rules, which may make such immigration difficult or impossible.[19] The migrant is again elevated to a super-class of local society.

The Court has been challenged on this by litigants claiming that this creation of 'reverse discrimination' against locals is in conflict with

17 G. Davies, *Services, citizenship and the country of origin principle*, University of Edinburgh, Edinburgh Europa Institute, Mitchell Working Paper 2/2007, available at SSRN: < http://ssrn.com/abstract=1007728> (accessed 6/11/2009).

18 Directive 2004/38, see *supra* n. 2, Art. 7(2).

the allegiance to the equality of Europeans that Art. 12 apparently professes.[20] If discrimination is prohibited, how can migrants be accorded privileged treatment that locals are denied? The Court has consistently accepted that such discrimination does result, but claims that it is not responsible and therefore cannot remedy the situation. The discrimination, it says, is the result of Member States who do not grant their own citizens rights of the same quality and scope as EU law grants to migrants. If Germany offered a universally flexible approach to qualifications, or allowed its own citizens to bring their families to live with them, then there would be no such disadvantaging. The discrimination is the work of the Member States, and only they can remedy it.[21]

This approach is legally impeccable inasmuch as if the Court were to grant rights to locals as well, it would be rewriting the Treaty and extending its own jurisdiction.[22] There is a constitutional basis that it relies upon for the division of competences. However, it is clearly problematic in its outcome. On the one hand, EU law turns stay-at-home citizens into second-class members of society, and elevates foreigners and locals who engage in international activities –

19 ECJ, Case C-64 and 65/96 *Uecker and Jacquet* v. *Land Nordrhein-Westfalen* [1997] *ECR* I-3171; ECJ, Cases 35 and 36/82 *Morson and Jhanjan* v. *Netherlands* [1982] *ECR* 3723.

20 Ibid.

21 Ibid.

22 C. Ritter, 'Purely internal situations, reverse discrimination, Guimont, Dzodzi and Art. 234', 31 *E. L. Rev.* (2006) p. 690; G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague, Kluwer Law International 2003) pp. 117-144.

cosmopolitans – to a special status.[23] On the other hand, it portrays the state as the failing party, the one that regulates irrationally, fails to respect equality, and chooses not to protect its citizens. It divides and then humiliates, which is the subject of the next two sections.

A remedy worse than the disease?

The exclusion of locals from the fundamental freedoms is a result of them finding themselves in a 'wholly internal' situation.[24] EU law grants rights to those who migrate or who engage in cross-border activities. Those who do neither, and whose situation encompasses facts and circumstances wholly within one state, simply fall outside EU jurisdiction.[25] The EU is not generally attributed responsibility for all law but simply to matters involving more than one state.

The Court adheres to this principle, but in recent years it has narrowed the scope of the exclusion in practice.[26] It has become easier to find a cross-border element within a situation that is sufficient to bring it within EU law. For example, in *Carpenter* the Court accepted that the presence of Mr. Carpenter's non-European wife in the UK made it easier for him to travel throughout the EU for his business, since there

23 N. Bernard, 'Discrimination and free movement in EC law', 45 *ICLQ* (1996) p. 82.
24 ECJ, Case 175/78 *The Queen* v. *Vera Ann Saunders* [1979] *ECR* 1129.
25 Ibid.; ECJ, Case C-108/98 *RI-SAN Srl* v. *Commune di Ischia, Italia Lavoro SpA, Ischia Ambiente SpA* [1999] *ECR* I-5219; ECJ, Case C-112/91 *Hans Werner* v. *Finanzamt Aachen Innenstadt* [1993] *ECR* 429.
26 N.N. Shuibhne, 'Free movement of persons and the wholly internal rule: Time to move on?', 39 *CML Rev.* (2002) p. 731.

was someone at home to look after the children.[27] Thus Mr. Carpenter, a British citizen, living in Britain, was able to rely on EU law to circumvent local immigration rules and import his wife, by claiming that the British refusal to grant her residence was an obstacle to his provision of services in other Member States. The connection with the cross-border is clear and real, but it is considerably less substantial and persuasive than in the case of a migrant to another state, who may argue that he or she is deterred from migrating if he or she cannot take the family along.

One of the most important diminutions of the internal exclusion, both in practice and in principle, is the reinstatement of the U-turn construction, whereby citizens may go abroad for a period and then return to their home state without losing their status as migrants.[28] Thus the Frenchman who goes to live in Italy and then returns to France continues to enjoy the protection of EU law even after he returns home, because his return was also a migration – from Italy to France. Hence, he continues to be a member of the protected class.[29]

This makes it considerably easier for citizens to fall within EU law,

27 ECJ, Case C-60/00 *Carpenter* v. *Secretary of State for the Home Department* [2002] *ECR* I-6279.

28 See ECJ, Case C-370/90 *R* v. *Immigration Appeal Tribunal and Singh, ex parte Secretary of State for the Home Department* [1992] *ECR* I-4265; ECJ, Case C-109/01 *Secretary of State for the Home Department* v. *Hacene Akrich* [2003] *ECR* I-9607; ECJ, Case C-127/08 *Blaise Baheten Metock and Others* v. *Minister for Justice, Equality and Law Reform* [2008] *ECR* I-6241.

29 ECJ, Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie* v. *R.N.G. Eind* [2007] *ECR* I-10719.

and opens the possibility of strategic migration with the ultimate goal of returning home under an improved legal regime. For example, people may cross the border to study, knowing that when they return home they will be able to make *Vlassopoulou*-like arguments in order to gain admission to protected professions, thereby avoiding burdensome local qualification procedures. The best-known case continues to be *Knoors*; he went from the Netherlands to Belgium, where training as a plumber was more accessible and amenable, and then demanded that the Netherlands recognise his qualification and allow him to practice when he returned home.[30]

The Court indicated that such U-turns might be considered an abuse of the law, but went on to say that in the particular case no such abuse is occurring.[31] In fact, it adheres far more often to the principle that people are entitled to exercise their free movement rights.[32] Going abroad because circumstances are more attractive there is not abuse, but is taking advantage of the fundamental freedoms in precisely the way that the Treaty intends. By contrast, it often says that doing so

30 ECJ, Case 115/78 *Knoors* v. *Secretary of State for Economic Affairs* [1979] *ECR* 399.

31 See e.g. *Akrich*, *supra* n. 28; ECJ, Case C-330/07 *Jobra Vermögensverwaltungs-Gesellschaft mbH* v. *Finanzamt Amstetten Melk Scheibbs*[2008] *ECR* NYP; ECJ, Case C-403/01 *Franca Ninni-Orasche* v. *Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] *ECR* I-13187; ECJ, Case C-110/99 *Emsland-Stärke* v. *Hauptzollamt Hamburg-Jonas* [2000] *ECR* I-11569; ECJ, Case C-36/96 *Faik Günaydin, Hatice Günaydin, Günes Günaydin and Seda Günaydin v. Freistaat Bayern* [1997] *ECR* I-5143; ECJ, Case C-212/97 *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen* [1999] *ECR* I-1459; K.E. Sorensen, 'Abuse of rights in Community law: a principle of substance or merely rhetoric?', 43 *CML Rev.* (2006) p. 423; A. Kjellgren, 'On the border of abuse – the jurisprudence of the European Court of Justice on fraud, circumvention and other misuses of Community law', 11 *EBL* Rev. (2000) p. 179.

purely in order to avoid local legal requirements might be abuse.[33] Yet the burden of proof is on the state, and it is a heavy one: how is it possible to show that a person had no motivation other than to circumvent the law? After all, even an intention to return does not prove this: Mr. Knoors may have always had the intention to practice as a plumber in the Netherlands, but simply chose the European training course that attracted him the most. This is his free movement right. It is hardly surprising that the concept of abuse has remained abstract and theoretical.

The U-turn is at its most controversial and significant where family members are involved. A European with a non-European partner and/or children has a considerable motivation to migrate, since the EU legal regime is more family-friendly than almost any national immigration law system. However, the price of an uncomplicated family reunion was, for a while, that the citizen must remain a migrant in a state other than his home state. Exile was thus the price of togetherness. This followed from *Akrich*, where the Court had said that migrants could only bring family members to live with them if those family members were already lawfully present within the EU.[34] The family rights could be used to take one's family from Member State to Member State, but not to admit them to the EU for the first time. This meant that the Dane who moved to Sweden could only rely

32 Ibid.
33 See e.g. *Ninni-Orasche* and *Emsland-Stärke*, *supra* n. 31.
34 See *Akrich*, *supra* n. 28, para. 50.

on EU law to bring his or her non-European family to live with him or her if the family members were already legally resident in the EU. However, if this was the case, then (a) they were almost certainly in Denmark, or (b) it would probably not be difficult to bring them to Denmark, since intra-European migration is relatively easy. The Danes who move to Sweden for family law reasons are precisely those whose family members are not yet in the EU, and whom Danish law will not admit. *Akrich* cut these migrants out of EU law, contrary to the clear text of the relevant directive but probably in accordance with the prevailing political mood.

In a rare example of an explicit admission that it was wrong, the Court has now overturned *Akrich* on this point, in *Metock*.[35] Here it reaffirmed that there is no requirement that family members already be lawfully within the EU before they fall under EU law. The rules are as simple as they seem: a migrant may bring his or her family to live with him or her, whatever their nationality.[36]

This may then be combined with the U-turn principles to create an effective way to circumvent national immigration law. The Dane spends a period in Sweden, brings his or her family, and then returns to Denmark, relying on the fact that he or she continues to be a migrant, and so continues to enjoy EU law rights, including family

35 ECJ, Case C-127/08 *Blaise Baheten Metock and Others* v. *Minister for Justice, Equality and Law Reform* [2008] *ECR* I-6241.
36 See Directive 2004/38, *supra* n. 2, Art. 7(2).

rights. Under a legal regime over which the Danish authorities have no control and cannot challenge, the family that Danish law excluded is now admitted.

Once again, it may be argued that this is abuse – and Member States always make this argument – but the Court has been reserved and it will be in any case difficult to prove. Spending six weeks in another state might be pushing one's luck,[37] but the migrant prepared to live abroad for a year can almost certainly meet any claims of abuse with success, and can return home triumphantly, family in tow.

These cases lead to a socially liberal outcome, where the Court places the right of an individual to be with his or her family above the right of a community to control entry. EU rights are made accessible to more people and in a way that is truly important to those who benefit. However, it continues to be a small group that benefits, and the divisive effect of free movement is only increased. Uniting foreigners with returning expats creates a group that is bigger than either, so that the U-turn construction has the effect of enlarging the new 'cosmopolitan elite'. Yet the larger this group is, and the more visible, the more resentment it will inevitably cause among those outside it. This is particularly so where immigration is concerned. The resentment of the stay-at-homes is not that they do not have family rights – most will not need or want them – but that the immigration

37 See *Ninni-Orasche*, *supra* n. 31.

laws that they prefer and have chosen via national democracy have apparently become optional for all those capable of establishing some kind of foreign connection. The more nationally oriented and rooted the citizen is – no migration, no foreign family members – the more he or she may feel relegated to a lower order of citizenship. This is even more so because the U-turn enables some nationals to enjoy EU rights as well. The sense of grievance is likely to be greater when members of one's own group are treated better than when privilege belongs only to a more intellectually and emotionally distant group of foreigners.

The humiliation of the state

The cases mentioned above limit the ways in which the state can define citizenship and its rights and obligations. For those who believed in the old definitions, this must seem like a diminution, or a failure, of that state. Salt is rubbed in the wounds by the way that the Court requires states to protect the rights in question along with other EU rights. The national legal system is treated as a serf, to be ordered to comply immediately, without thought for its own needs or logic. In principle, Member States have procedural autonomy, and EU law is to be absorbed within existing structures. However, there are cases where the Court goes beyond ensuring that EU rights are protected, and determines how they should be protected. In particular, it has effectively declared in a number of cases that national legal systems are defective in ways that challenge entrenched national procedural

traditions and values.

One of the most elegant of these cases is *Ciola*.[38] This concerned an Austrian who owned moorings for yachts on a lake in Austria. A decision by the local authorities set a maximum on the number of these moorings that could be rented to foreigners, but Mr. Ciola ignored this and exceeded the quota. He was prosecuted, and two questions were referred to the Court of Justice. One was whether the quota was contrary to EU law, and the unsurprising answer was that it was. However, the second was whether EU law permitted Mr. Ciola to be punished for ignoring the order. The argument of the Austrian authorities was that if he believed the order to be wrongful, he should have challenged it in court, following the procedures of Austrian administrative law. If he had won, the order would have been set aside and he could have rented as many moorings as he wanted to whomever he liked. However, until the order had been found to be unlawful by a judicial authority, it should be treated as binding, and he was obliged to respect it. Simply taking a view that it conflicted with EU law and therefore ignoring it was more than he was permitted to do.

This is not a strange argument. Most legal systems do not encourage self-help. The response to a public act that one objects to is to challenge it, not to ignore it. The binding effect of a decision is

38 ECJ, Case C-224/97 *Ciola* v. *Land Vorarlberg* [1999] *ECR* I-2517.

independent of its lawfulness. This principle serves the very good cause of legal certainty and predictability. The long-term legal position may be unclear because one does not know who will finally win the challenge, but the immediate legal position is unequivocal: while there is a dispute over the validity of the law, the law must in general be obeyed.

EU law is apparently an exception. The Court rejected the Austrian government's standpoint. Saying that the obligation to respect EU law applied to all national authorities, it found that a decision or other administrative act contrary to EU law could not be applied, and must be treated as inapplicable. This meant that the court enforcing Mr. Ciola's fine for disobeying the quota order had to treat that order as effectively non-existent. Inevitably this would mean that the fine could not be enforced, since there was no 'applicable' order that he had ignored.

The ratio of *Ciola* is therefore that national acts contrary to EU law can be ignored with impunity. This encourages risk-taking, as well as a contemptuous approach to the state: namely, the system as such deserves no respect and its views carry no weight – the only question is who is ultimately right. The citizen who is convinced a rule is contrary to the Treaty may simply treat it as void without further ado. If the citizen is right, she or he will get away with it. If the citizen is wrong, she or he can probably expect to be punished with as much severity as the authorities can accommodate within the discretion that

the law allows them. One can be sure that Mr. Ciola would have a better relationship with the local authorities had he waited for the ruling dismissing the order before ignoring it. However, he may well feel much more independent and assertive now because he successfully did not. This is one citizen whose relationship to the state has perhaps been changed.

Ciola is a follow-on in spirit to *Simmenthal*, as the Court noted.[39] That case concerned an Italian law that was possibly contrary to the Treaty. The Italian constitutional court had recently ruled that it was the only Italian judicial body competent to set aside national laws, and therefore such conflicts should be referred to it by lower judicial authorities. If it ruled – perhaps after a reference to the Court of Justice – that there was a conflict, it would set the national law aside, whereupon the referring judge could decide the case without reference to that law, in conformity with EU law.

A brave lower court judge asked the Court of Justice whether this was acceptable, and the Court said no. Every judge or judicial authority was bound to apply EU law directly and to set aside conflicting national provisions.

This serves well the cause of maximally effective EU law. The time taken for a reference to a national constitutional court, particularly in

Italy, is long.[40] However, it cannot be argued that it is necessary for the enforcement of EU rights, unless one maintains that the Italian system is in fact inadequate – that the possibility of a reference to the constitutional court is theoretical, useless, and denies justice. Since the Italian constitutional court had just recently ruled that this is how things should work, such an approach would be a remarkable slap in the face from the Court of Justice. Moreover, there are presumably internal reasons for the Italian system. It was not just EU law conflicts that had to be referred. If a local judge considered that a national law conflicted with the Italian constitution, it was also obliged to refer this. The Constitutional Court had exclusive jurisdiction to set aside Italian parliamentary law.

Such setting aside is indeed a weighty act if one takes parliamentary democracy seriously. It is not unusual that some legal systems reserve this function for certain judges, while others, such as the British and Dutch, have for centuries considered such setting aside to be beyond even the highest courts. For the ECJ to intervene in the national system and to re-allocate judicial functions in this way, requiring that even the lowest administrative decision makers must take a view on the compatibility of national and EU law and give preference to the latter, is close to allocating to simply anyone the power to set aside

39 ECJ, Case 106/77 *Amministrazione delle finanze dello state* v. *Simmenthal SpA* [1978] *ECR* 629. See also ECJ, Case 146/73 *Rheinmühlen-Düsseldorf* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] *ECR* 139.

40 F.G. Jacobs et al. *European Convention on Human Rights*, 3rd edn. (Oxford, Oxford University Press 2002) pp. 166-168.

national law. A specific judicial function is allocated by the national system to a specific group of people, selected with that function in mind, but the ECJ decides that any civil servant is in fact capable of doing it. After all, many administrative decisions – building permits and so on, in fact most administrative decisions – are not taken by judges or even by those with legal training. Every public decision-making body is now a constitutional court.

The defence is that these lower authorities can if they wish usually refer questions to the Court of Justice. However, they are not obliged to do so,[41] and if the national system does not consider them capable of judicial review, it looks like misplaced faith to think that they will inevitably understand properly when and how to refer. Another defence is that there is always the possibility of appeal. But this is a slapdash approach to law, and amounts to letting everyone be a judge, as long as the highest courts are competent. Legal systems usually try to ensure that even the lowest decisions are taken by those properly schooled and able, rather than going for quick and cheap justice with the possibility of slow and expensive remedies afterwards.

Not only does the Court of Justice in *Simmenthal* show contempt for

41 Art. 234 EC provides, with reference to questions of EU law, that:
…..Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

the coherence of the national system and the logic of its allocation of functions but the real and unspoken reason for its decision accentuates this. It is widely considered that Supreme Courts have a more hostile and fragile relationship with the Court of Justice than do lower judges. The top national judge was once at the peak of the judicial pyramid, and it is no doubt difficult to accept that others now supervise his or her work. Anecdotal evidence suggests that at least in some quarters there is a tradition among national Supreme Courts of resisting references.[42] The Court in *Simmenthal* wanted to break the Italian Constitutional Court's monopoly on EU law issues in Italy, and to co-opt the much larger and more sympathetic lower judiciary in its cause. This is effective from the narrow perspective of achieving the immediate goals of EU law. However, it is also once again a humiliation of the state, of its highest judicial organ. Judicial review of legislation is left to Supreme Courts because it is important, difficult, and sensitive, and these are the highest judges. Now the Court of Justice allocates part of its function to the lowest ranks of the judiciary, implicitly sending the message that Supreme Courts cannot entirely be trusted with EU law, and moreover that what they do is really not so difficult – lower judges can in fact do it as well.

This distrust of Supreme Courts is in fact a thread through much of EU procedural law, beginning with the Art. 234 preliminary reference

42 See e.g. ECJ, Case C-129/00 *Commission* v. *Italy* [2003] *ECR* I-14637; R. Crowe, 'The Preliminary Reference Procedure: Reflections Based on Practical Experiences of the Highest National Courts in Administrative Matters', 5 *ERA-Forum* (2004) p. 435.

system. This allows all judges and tribunals to refer questions to the Court of Justice, but with a special provision for judges and tribunals against whose decisions there is no appeal – which of course includes supreme courts. These latter are required to refer any question of EU law that comes before them. The nation's highest judges are the only members of its judiciary that are prohibited from interpreting EU law on their own.[43] The lowest magistrate may interpret a directive, consider whether a Treaty article encompasses a given situation, how it should be read, what its purpose is, and so on. Supreme courts, by contrast, faced with a piece of EU law that might be read in different ways, must not address the issue but refer it immediately to Luxembourg.

The reason for the rule is to prevent EU law from being interpreted differently in different Member States, and it is true that without the reference requirement that risk would be real and would undermine the unity and legitimacy of the EU legal system.[44] However, it could have been achieved differently: for instance, by appeal from national supreme court decisions to Luxembourg, or by requiring Supreme Courts to formulate judgments for approval, or by making references

43 See *supra* n. 41; G. Davies, 'Abstractness and concreteness in the preliminary reference procedure', in N. N. Shuibhne, ed., *Regulating the Internal Market* (Cheltenham, Edward Elgar 2006) pp. 210-244, also available as *The division of powers between the European Court of Justice and national courts* available at SSRN: <http://ssrn.com/abstract=861824> (accessed 9/11/2009).

44 See ECJ, Case 66/80 *International Chemical Corporation* [1981] *ECR* 1191; T. Tridimas, 'Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure', 40 *CML Rev.* (2004) p. 9.

compulsory if one party requests it.[45] Yet the appeal path has traditionally been seen as even more denigrating to supreme courts, since it might involve them being overruled.[46] Thus a choice has been made to effectively cut Supreme Courts out of the European legal system.[47] Rather than risk losing the game, they simply do not play. All national judges roll up their sleeves and dig into EU law under the guidance of the Court of Justice while the national Supreme Courts watch from the sidelines.

This must undermine the national legal system along with the hierarchy and the respect within it. Supreme Courts are not just the last word but are the officially declared top experts. Their views and words carry weight in the legal world and guide the thoughts of judges and practitioners. If they do not participate in the EU law development process, they will lose stature, as an area of law develops where most national judges are increasingly confident and able, but where Supreme Court judges have no experience or track record.

The system is also being fragmented. Particularly in civil law systems, which have no formal doctrine of precedent, the functioning of the legal system is said to depend upon the creation of a certain mentality

45 P. Craig, 'Community Court jurisdiction revisited' in G. De Burca and J.H.H. Weiler, eds., *The European Court of Justice* (Oxford, Oxford University Press 2001) p. 177.
46 Working Party on the Future of the European Communities' Court System, *Report by the Working Party on the Future of the European Communities' Court System*, (Brussels, European Commission and European Court of Justice 2000).

shared throughout the judiciary.[48] Judges progress slowly up the ladder if their decisions survive the test of appeal, showing that the judge has learned to think as his or her superiors do. Yet this homogeneity of mindset is surely threatened if there is an area of practice and law that lower courts must engage in without guidance from the top. The logic of the civilian legal system does not allow such an isolation of the supreme judicial authority.

The preliminary reference procedure is more destabilising than it seems. In some ways it reverses the judicial hierarchy, letting lower judges become constitutional courts while higher judges must keep their silence. The pride attributed to Supreme Courts, which meant that back in 1957 it was considered too sensitive to allow them to be contradicted, is now extracting its price.

Nor could it be said that the Court of Justice is trying to alleviate the problem. On the one hand, in *CILFIT* it noted two exceptions to the obligation to refer, but so tightly formulated as to be non-existent.[49] *CILFIT* is, on the face of it, more a reaffirmation of the dangers of allowing Supreme Courts loose on EU law than a relaxation of the

47 'The Court of Justice has tried by all means to prevent national courts from coming to Community maturity'; F. Mancini, 'The making of a constitution for Europe', 26 *CML Rev*, (1989) pp. 595 and 606.

48 M. Lasser, 'Anticipating three models of judicial control, debate and legitimacy: the European Court of Justice, the Court de cassation, and the United States Supreme Court', Jean Monnet Working Paper 1/03, available at <http://www.jeanmonnetprogram.org/papers/03/030101.html> (accessed 9/11/2009).

49 ECJ, Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA* v. *Ministry of Health* [1982] *ECR* 3415.

view. On the other hand, in *Köbler* and *Commission v Italy*, it was emphasised that states could be liable in damages, or fined, for failures to refer.[50] In some ways this could be seen as an implicit adaption to the reality that reference will not always occur. However, the dominant note in the judgments is simply that Supreme Courts must refer and states should pay if they do not.

The idea of damages for failure to refer raises two issues. On the one hand, making the state pay for the actions of its judges challenges the division of powers within the constitutional system. How can the executive – who will have to pay – be responsible for the actions of a body independent of them – the judiciary? The Court's response to this was simply that not permitting state liability would weaken EU rights and the effectiveness of the law.[51] Once again, a classic legal constitutional argument is met with one based on a rights-oriented policy, and the latter wins easily. Clearly all those constitutional sacred cows are a great deal less important than constitutional lawyers would have us believe.

Rather more interesting is the question of how such damages would be enforced. Liability for state breaches of EU law is adjudicated by

50 ECJ, Case C-224/01 *Gerhard Köbler* v. *Republik Osterreich* [2003] *ECR* I-10239; ECJ, Case C-129/00 *Commission* v. *Italy* [2003] *ECR* I-14637. See also ECJ, Case C-173/03 *Traghetti del Mediterraneo SpA* v. *Italy* [2006] *ECR* I-5177.
51 Ibid.

national courts,[52] so presumably the litigant who was refused a reference would have to start again at the bottom of the national judicial system. One might expect a lower judge faced with such a case to either panic or to refer to the Court of Justice – or both. However, there is no obligation to refer, and in principle there is no need: the rules governing the obligation to refer are fairly clear, and it is simply for a judge to apply them to the facts and decide whether the supreme court did in fact have a question of EU law before it, whether it ruled wrongly on that, and whether this has caused damage. It is of course almost unimaginable that lower courts would rule on their own initiative that the supreme court was wrong in law, but this may be less of a stumbling block than it seems. The whole issue of damages for failure to refer may arise because a subsequent judgment from the Court of Justice makes clear that the national Supreme Court was wrong. This is what happened in *Köbler*. Under these circumstances, the national judge simply has to decide whether the error was serious enough, and whether it caused damage. Thus, the issues in the case may well all be applicatory and not interpretative, and so a reference may be unnecessary.[53] In fact, in questions of state liability, the Court almost always insists, if sometimes unconvincingly, that it can merely explain the principles, but it is for the national judge to decide finally

52 ECJ, Case C-46 and 48/93 *Brasserie du Pêcheur SA* v. *Germany and R v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] *ECR* I-1029.

53 See P. Craig and G. de Burca, *EU Law: text, cases and materials*, 4th edn. (Oxford, Oxford University Press 2008) pp. 493-494; Davies 2006, *supra* n. 43; See also ECJ, Case C-206/01 *Arsenal Football Club Plc* v. *Matthew Reed* [2002] *ECR* I-10273; The UK High Court

whether there has been a sufficiently serious breach that payment of damages is justified.[54]

The Court thus seems to envisage that lower courts will rule on the degree of wrongfulness of higher judicial decisions, and will award damages for the actions of their superiors. This is either fanciful or radical, depending upon whether the Court seriously expects it to happen. One way that it may occur is via the dual legal systems that some continental countries enjoy: an administrative court may be called to consider whether damages should be paid for a failure to refer by the supreme civil court. In that case, reluctance may even turn into enthusiasm.

Like *Simmenthal*, *Köbler* is the motto 'divide and conquer' in action. All of the above-mentioned cases are Guantanamo-like attempts to disorientate the national system to the extent that it concedes; to turn national courts upon each other; to reverse the hierarchy; to instruct lower judges to judge higher ones; to punish the state for things it cannot help; and to encourage citizens to ignore the administration. It is all perfectly sensible from an EU law policy perspective, but it is a world turned upside down for the traditional constitutionalist, as well as for the constitutionally aware citizen. The inability of the state to defend itself – and there have been no serious attempts to challenge

case no. HC 1999-0038. Annotated by A. Arnull, 'Case Law; B. National Courts', 40 *CML Rev.* (2003) p. 753.

54 Ibid.; see *Brasserie du Pêcheur*, *supra* n. 52.

these doctrines of the Court – is then the final disillusionment. The state has been made small.

4. The right to opt out

Having elevated the individual and diminished the state, it is a logical next step to grant the citizen a right to opt out of his community. This is what the Court has done with a number of cases applying the law on free movement of services and citizenship to the institutions of the welfare state. The cases are at first glance doctrinally orthodox, but a closer examination reveals that they are economically and socially novel, and even in tension with some of the underlying policy bases for the internal market.

Medical services was the first area of the welfare state to feel the liberalising force of EU law, initially in *Kohll*, where the Court found that a Luxembourger had the right to be reimbursed by his medical insurer for dental services received in Germany.[55] The free movement of services entailed that recipients of those services could choose to obtain them in other states, and measures that impeded such cross-border provision were in principle prohibited.

This is not too radical. A rule that an insurer only pays for domestic services is largely a rule of administrative convenience. It is easier to check quality and legitimacy of documents and services within a state.

55 ECJ, Case C-158/96 *Kohll* v. *Union des Caisses de Maladie* [1998] *ECR* I-1931.

However, in a straightforward insurance context, where the insurer pays for a given service up to a certain amount, there is no fundamental reason to be concerned about the nationality or location of the provider as such.

However, the Court has extended the rigours of Art. 56 TFEU beyond the commercial sphere to public organisations, most recently in *Watts*.[56] In this case, a woman was the victim of the British National Health Service, a state-funded health service free to residents of the UK. The system is based around the separation of payment from patients, with the state providing the services free at the point of delivery to those in need. This has a certain ideological charm, and removes the need for an insurance bureaucracy, with some consequent efficiency gains. However, the system also has long waiting lists and patients are relatively under-empowered compared with those in an insurance-based system, where the patient may usually take his or her funding to the provider of choice.

Mrs. Watts had to wait for a hip operation longer than most doctors would consider responsible, but within what was unfortunately the norm for the NHS. She asked for permission to have the operation abroad, and to have the costs reimbursed by the NHS. This was refused, and she appealed, finally obtaining a reference to the Court of Justice.

56 ECJ, Case C-372/04 *Yvonne Watts* v. *Bedford Primary Care Trust, Secretary of State for Health* [2006] *ECR* I-4325.

The Court gave an orthodox answer that was identical to that given in earlier cases: a refusal to pay for treatment abroad constitutes a restriction on the free movement of services, since it makes it harder and less attractive for patients to choose to obtain their remunerated medical services from foreign providers.[57] Mrs. Watts was manifestly discouraged from going to the French hospital that had offered, in return for payment, to treat her, by the fact that the NHS would not cover the costs. Such a restriction on services could be justified by the need to protect the stability of the health system under certain conditions. It was acceptable to restrict payment for non-system treatment to cases where the system could not provide treatment without undue delay. The question then was what constituted 'undue delay', and this must be determined by reference to the patient's circumstances as a whole, not the NHS normal practice, and there must be objective guidelines set out and the possibility of appeal to a court.

The importance of *Watts* is that it confirms an extension of the definition of a 'restriction on the free movement of services'. The refusal to pay for foreign treatment comprised such a restriction, even

57 E.g. ECJ, Case C-368/98 *Vanbraekel* v. *Alliance Nationale des Mutualites Chretiennes* [2001] *ECR* I-5363; ECJ, Case C-157/99 *Geraets-Smits* v. *Stichting Ziekenfonds and Peerbooms* v. *Stichting CZ Groep Zorgverzekeringen* [2001] *ECR* I-5473; ECJ, Case C-385/99 *Müller-Fauré* v. *Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen and van Riet* v. *Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] *ECR* I-4509; ECJ, Case C-56/03 *Inizan* v. *Caisse Primaire d'Assurance Maladie des Hauts-de-Seine* [2003] *ECR* I-12403; ECJ, Case C-193/03 *Betriebskrankenkasse der Robert Bosch GmbH* v. *Bundesrepublik Deutschland* [2004] *ECR* I-9911; ECJ, Case C-145/03 *Héritiers d'Annette*

though there was an identical refusal to pay for similarly provided national treatment – the NHS would not have paid for Mrs. Watts to go to a local private hospital either.[58] The simple fact that a closed health care system had been created – based on free services and no payment – was enough to conflict with Art. 56. The NHS is, in its very essence, a restriction on the free movement of services.

Of course on one level this is correct. All closed systems discourage exit, and in that sense discourage persons from going to non-system providers, including foreign providers.[59] Free primary school education discourages parents from sending their children abroad; if the state provided payment vouchers that could be used internationally as well as domestically, then more parents might be inclined to send their children to schools in other states that demand payment. But most parents will not pay for schooling if it is available free at home.[60] Similarly, some states subsidise transport for certain groups, such as students or pensioners, but only on the domestic transport system. This clearly discourages these groups from crossing the border and using paid transport services abroad. Why go to the town across the border to shop or study or party if you have to pay to get there, while transport home from a town in your own state is free? One might go

Keller v. *Instituto Nacional de la Seguridad Social* [2005] *ECR* I-2529; ECJ, Case C-466/04 *Manuel Acereda Herrera* v. *Servicio Cántabro de Salud* [2006] *ECR* I-5341.

58 See *Watts*, *supra* n. 56, para. 81 and paras. 99-100.

59 Ibid.

60 See ECJ, Case C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] *ECR* I-6849.

further: some states are generous with subsidies for the renovation of old houses, or contribute to rental costs, but only for people living in that state. The financially challenged person clearly has a motivation to stay in that state, and not to rent or buy a house across the border.

As long as states exist and collect taxation it will not be possible to entirely prevent a certain degree of closure. The logic of the state is that citizens, or residents, contribute via taxation and receive via services of various kinds. To insist that all services must be provided without reference to borders is to render the state incoherent. It breaks the link between obligation and benefit, and makes national budget control impossible. There is a structural difference here between public services provided via a remunerated market mechanism – if the state provides subsidy to the consumer, then one might think that the consumer may be left free to decide whether to spend it on domestic or foreign providers, as in an insurance-based health care system – and services provided free – education, policing, libraries. To insist that these non-commercial services, which are not provided for remuneration, nevertheless comprise an obstacle to the free movement of services is to say that the state should offer citizens the option of engaging a commercial alternative, including a foreign one – foreign surgeon, security services, library service – and be able to send the bill to the state.

This has a dramatic effect on the state, forcing it to rethink its way of working. If the NHS cannot be kept closed, it becomes financially

vulnerable, and it may be better to move to an insurance-based system. Judgments like *Watts* have a direct liberalising effect,[61] although it is simply the first in a chain of consequences. As states move away from direct provision of services, society changes in order to avoid the financial risks inherent in patients exercising their rights to opt out. Welfare services are important for social cohesion, and the presence of quasi-monopolies ensures a sort of equality of access and provision that is important to national identity and patriotism.[62] Collective participation in a huge, benign, non-profit-making care organisation contributes significantly to the solidity of a society. Fragmenting and privatising leads to a society in which neighbours do not share experiences, have different rights and privileges, depending on their insurance choices, and do not feel bonds of solidarity and obligation.[63] Institutions matter.

Moreover, the granting of procedural rights to individuals, which in Watts was portrayed as no more than a logical step to ensure the effectiveness of Art. 56, accentuates this. It changes the individual-state relationship and once again makes the NHS vulnerable. Many systems are premised on the collective good rather than on individual rights. Apparently that is not acceptable. The free movement of

61 G. Davies, 'The effect of Mrs Watts' trip to France on the National Health Service', 18 *King's Law Journal* (2007) p. 158.
62 G. Davies, *'The process and side-effects of harmonisation of European welfare states'*, Jean Monnet Working Paper 2/06, available at < http://centers.law.nyu.edu/jeanmonnet/papers/06/060201.html> (accessed 10/11/2009).
63 Ibid.

services requires non-commercial public services to integrate a rights-based view of access and to accommodate individual litigation.

What makes this more than simply a description of the kinds of social changes that European integration inevitably brings is the fact that nothing in *Watts* was inevitable. It does not follow naturally from Art. 56, and is even at odds with some of the premises of that Article. Art. 56 aims at turning separate national service markets into a single European one, with advantages of competition between providers, and with the possibilities of economies of scale.[64] Art. 56 is not concerned with the behaviour of non-commercial public service organisations, but with the state relationship with businesses, or with state intervention in the relationships between businesses, or between businesses and their customers. It is a new step to use Art. 56 to grant individuals procedural rights against a public organisation like the NHS, which is at least arguably itself not part of the internal market,[65] and to require that such non-commercial organisations enter into competition with foreign commercial ones. This is not extending markets but creating them. Moreover, the economic logic here is different. Economies of scale are doubtful, as mergers and acquisitions between public organisations are unlikely. Indeed, the

64 See the Spaak Report, *Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères* (Secretariat of the Intergovernmental Conference, Brussels, 21st April 1956), discussed in L.W. Gormley, ed., P.J.G. Kapteyn and P. Verloren van Themaat, *Introduction to the Law of the European Communities* 3rd edn. (the Hague, Kluwer Law International 1998) pp. 14-15.

65 See Davies, *supra* n. 61, pp. 158-167.

effect of such cases is to reduce the size of providers; no health care organisation in the world is as big as the NHS, or enjoys such potential for scale economies, and these are reduced by the fragmentation that it is undergoing in response to market pressures. Further, it is questionable whether effective and efficiency-enhancing competition will result; health care services, like other quasi-public services, are so riddled with subsidies and distortions that the cost of a service is difficult to identify. The price that a recipient pays for a health service abroad almost certainly has an unconvincing connection with its actual cost. The economic effect of free movement is primarily to distort subsidy flows, so that for example Belgian taxpayers subsidise British patients who go to Belgium for treatment because prices are in fact too low, or British taxpayers subsidise Belgian patients because prices are in fact too high. There is a very long path of state reform and privatisation to travel before free movement will have the simple economic benefits that it may accrue in less complicated markets. *Watts* and cases like it create an imperative to travel that path: a little liberalisation creates such economic distortions that governments are almost forced to go further.

None of this can be explained on the basis of Art. 56. The Court says that any measure that makes the cross-border provision of services less attractive falls within that article, but this is a facile reading.[66]

66 ECJ, Case C-55/94 *Gebhard* v. *Consiglio dell'Ordine degli Avvocai e Procuratori di Milano* [1995] *ECR* I-4165; ECJ, Case C-76/90 *Säger* v. *Dennemeyer and Co Ltd* [1991] *ECR* I-4221.

Almost any measure with financial implications affects the attractiveness of foreign purchases. If tax rates go up, one has less to spend. If housing prices go up, or sick-pay rates go down, personal financial assessments change as a result. The only way to render Art. 56 as less than a global review of all legislation – which it was clearly not intended to be – is to read it more precisely: for example, to detect measures that in some sense make foreign service provision specifically less attractive than its domestic counterpart.[67] In *Watts* this was not the case. The simple choice to provide a free service, when it could have been provided for payment, was enough to violate the article, making it an obligation on the state to extend markets as far as possible, rather than an obligation to make them fair and non-discriminatory where they exist. The difference is that the former does not lead to better markets as such, but does lead to a restructuring of the state. The right to opt out trumps the collective choice not to make certain services part of a commercial market.

A number of university cases also prize the individual right to opt out over economic and social coherence, but this time within the context of citizenship rules.[68] Where *Watts* applies economic law without thought for constitutional or social consequences, these cases apply constitutional law – citizenship – without thought for economic

67 See Davies, *supra* n. 4; E. Spaventa, 'From Gebhard to Carpenter: Towards a (non) economic European constitution', 41 *CML Rev.* (2004) p. 743.
68 ECJ, Case C-147/03 *Commission* v. *Austria* [2005] *ECR* I-5969; ECJ, Case C-65/03 *Commission* v. *Belgium* [2004] *ECR* I-6427.

coherence.

The problem that required attention was that of German students going to study in Austria, and Dutch students going to study in Belgium.[69] In both cases, large states having restrictive access to certain courses of study, or insufficient places, resulted in a significant flow of students to universities in smaller neighbouring states. This had two major consequences: the smaller states were required to pay for the education of their neighbours' children, since these were entitled to the same hugely subsidized fees as local students, and some university courses became overfull, resulting in a shortage of places for local children wishing to study certain subjects. Austria and Belgium both reacted with bureaucratic requirements, which in substance made it harder for foreign students to enter their universities.

The Court's reaction was to dismiss the requirements and to take a fatalistic approach to the possible consequences for the higher education system. This was simply the consequence of citizenship. Students have a right to study anywhere in the EU, without discrimination on grounds of nationality. Quotas, which the victim states were trying to achieve indirectly, were prohibited, as was charging higher fees to foreigners. A university may not distinguish according to the origin of its students, at least not if they come from

69 Ibid.

the EU. This is all conventional law.[70]

Yet an important issue is glossed over in these cases. Higher education in Europe is not generally paid for by the students but by the state. Student fees vary from being symbolic, in most countries, to being inadequate, in the UK, but nowhere do they come close to costs. Who has the obligation to pay for these students? Which state should pay? One may hypothesise a Europe in which individuals migrate without reference to their means, and receive support from the place where they live. But it is not the Europe we live in, for two reasons. The first is that the sense of community is not yet so profound that one state is prepared to receive penniless migrants from another. There is a feeling that benefits should be linked to belonging, to membership in some sense. This does not have to be nationality – it could be residence for a period – but the idea that a poor Greek can move to Sweden with no other aim than to receive generous benefits is rejected in society and in law; provisions exist that explicitly require migrants to have sufficient resources or to be economically active.[71] The second reason is that there is, as in the health case, a deeper logic to this, a relationship between rights and obligations. The state supports those who support the state by expressing commitment to it: for instance, by working there, bearing the passport with the associated obligations,

70 ECJ, Case C-224/98 *D'Hoop* v. *Office Nationale de l'Emploi* [2002] *ECR* I-6191; ECJ, Case C-184/99 *Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] *ECR* I-6193; ECJ, Case C-209/03 *Dany Bidar* v. *London Borough of Ealing* [2005] *ECR* I-2119; ECJ, Case 293/83 *Gravier v. City of Liège* [1985] *ECR* 593.

71 See Directive 2004/38, *supra* n. 2, Arts. 7 and 14.

paying tax, or simply living in that country for a period, showing a desire to join that society, adding to its social capital. Mere passers-by or opportunists do not acquire membership, do not contribute in the same way, and arguably should not have the same right to assistance. To grant them this is to undermine the contract that the others have made with the state, thus taking away their privileges.

Legally, this challenges the idea that unequal fees would be discriminatory. Fees based on residence – the norm in the US, between the states – would not be direct discrimination, but would only indirectly disadvantage the foreigner, and so are open to justification.[72] The justification would be that support for education is the responsibility of the state to the members of its society, not to visitors, a matter supported by the legislative restriction of student grants to those who have resided in the state for five years.[73] The distinction between this and fee subsidies is analytically trivial, and yet the Court holds fast to the idea of equal fees.

It is a good example of activist intervention in social relationships. Equal fees do encourage migration, by making it essentially costless for the migrant, and transferring the burden to the host state. It is quite right to bring this under EU citizenship, because it is a way of creating

72 See A.P. van der Mei, 'Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law', 19 *Ariz. J. Int'l & Comp. L.* (2002) p. 803; G. Davies, 'Higher Education, Equal Access, and Residence Conditions: Does EU Law allow Member States to Charge Higher Fees to Students not Previously Resident in that State?', 12 *MJ* (2005) p. 217.

a pan-EU community and identity, and probably a reasonably effective way. Students are the grown-ups of tomorrow, and mixing them will have longer-term effects. Yet this is EU citizenship being created at the cost of national citizenship, because the relationship between local students and their state is undermined. Not only is there a loss of privilege but net recipient states are pushed to either raise fees or to cut funding to protect their budgets from migration.[74] The quality of higher education or access to it really is reduced by the economic irrationality of demanding equal fees. However, net donor states may find that they are losing students with talent and initiative, who may be disproportionately among those inclined to seek adventure abroad and to search out the best places to study.

Students are therefore granted a right to opt out of their local education system, with benefits for the most mobile individuals and disadvantages for the least. The state is encouraged to retreat from higher education as much as possible, and the community-forming role of educational institutions is diminished. This is EU citizenship in competition with national citizenship.

5. The threat of abandonment

73 See Directive 2004/38, *supra* n. 2, Art. 24; See also *Bidar*, *supra* n. 70.
74 M. Dougan, 'Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?', 42 *CML Rev.* (2005) p. 943.

States increasingly try to protect their social and benefit systems from parasitic migrants by imposing residence conditions. Benefits are only available to those who have lived in the state for a certain number of years. The Court accepts that such conditions are legitimate, if applied in a proportionate way.

However, they may also affect the national citizen, who has emigrated. If Jan wants to return from Britain to Holland, he too may have to wait for a number of years before he is treated as sufficiently integrated into Dutch society to receive all its benefits again.

The law on this is in a state of transition. It is clear that those who are economically active are rarely, if ever, subject to such conditions. However, students, job-seekers, and non-economically active migrants often are. In *Bernini,* the Court first took a highly principled position on a Dutch rule that restricted study finance to those who had been residents for five years.[75] This was only acceptable if it applied to Dutch citizens as well. Thus the Van Damme's, who live in Florence, would not be able to send their son Jan to study in Leiden and expect him to receive study finance unless the same option were open for every Italian student too. Since states do not wish to extend such expensive benefits to all comers, they prefer to exclude their own nationals who have emigrated.

75 ECJ, Case C-3/90 *Bernini* v. *Minister van Onderwijs en Wetenschappen* [1992] *ECR* I-1071.

In *Forster*, the Court has retreated from this position, apparently ruling that study finance may be subject to a residence period for foreigners even if it is not so for nationals.[76] This is a rare example of the Court allowing national citizens a special privilege in the sphere of benefits. Yet the case is probably restricted to the instance of study finance, and other cases re-iterate the *Bernini* position – that the national who goes abroad and returns must be treated in the same way as the foreigner who arrives for the first time.

This conceptual step is bigger than any other with regard to non-discrimination. The first step in equality may be seen as treating the foreigner as a national – allowing him or her to join the club. This is of considerable practical importance, but is only a limited conceptual challenge. Societies may be based on membership, but not many are based on the idea that the membership list is closed. Provided a new member wishes to join, this does not threaten the foundational principles of the club.

However, it is a step further to say that a national who goes abroad must betreated as a foreigner when he or she returns.[77] This challenges the idea of a permanent bond between national and nation, which survives wherever the citizen may go.[78] For many people, and states,

[76] ECJ, Case C-158/07 *Jacqueline Förster* v. *Hoofddirectie van de Informatie Beheer Groep* [2008] *ECR* NYP.

77 See G. Davies, 'Any Place I Hang my Hat? Or: Residence is the New Nationality', 11 *ELJ*(2005) p. 43.

[78] ECJ, Case 186/87 *Cowan* v. *Tresor Public* [1989] *ECR* 195.

such indestructibility is central to the way national citizenship should be understood. Wherever people may live or travel, they should carry with them the idea that they could go 'home' and immediately be taken up into the privileged group, instead of being treated as a new immigrant.

The logic of *Bernini* therefore makes national citizenship a transitory and conditional thing; it is really just a membership of convenience tied to actual residence in the state, and the claim to be more than this hangs only by the thread of national political participation, the one exclusive right that the EU does not take away. This is perhaps the most explicit constitutional trade-off between the European and the national. The price of enjoying the rights of EU citizenship is directly measurable in national citizenship, which sees its substance and value made less.

6. Conclusions

EU citizenship is narcissistic. It severs rights from obligations, contributing to a form of individual liberation. Instead of the individual adapting to the state, the state is increasingly, where migrants are concerned, required to adapt to the individual. In rebalancing the state-individual power relationship like this, to the detriment of the national order, EU constitutionalism becomes a

competitor to rather than a complement of national constitutionalism. Attracting support for this notion is based on glorifying the individual and humiliating the state. Citizens are bought with attractive rights, while their allegiance to the national collective is reduced by systematically diminishing the value of its principles of order and structure, and by reducing its capacity to treat its own citizens as special.

This is a dangerous tactic, which can result in backlash. In all the aforementioned cases, EU allegiance remains fragile and shallow when compared with national identity. There is a real risk of divergence between documents and public mood, with constitutional Treaties being experienced as a rejection of the values and bonds that people share, rather than as an embodiment of them. If European constitutionalism is to survive, it will not be because it is well captured in legal terminology but because European society comes to prefer what it offers.

The essence of the deal is rights for equality. The liberties that EU citizenship brings ensure that national societies will consist ever less of people who share experiences and institutions, and since different is never quite equal, there will be more winners and losers. The question is whether the European public will accept this deal.

A transition from equality-based to rights-based constitutionalism is not impossible, and the preference for one or the other of these kinds

of society is highly subjective. Both reflect legitimate and traditional constitutional values, but order them differently. Yet it is easy for the EU to overestimate European readiness to make this transition. It is staffed by migrants who are beneficiaries of the new order, the new cosmopolitans, and it is an urgent institutional question whether these people are still in touch with the stay-at-home outsiders to EU law. The emphasis in policy and scholarship on migrants should sound alarm bells. EU citizenship may not be zero-sum, but it is not win-win either. Piling rights upon rights for the migrant minority, without looking at what these rights say and do to the position of the majority who live outside the EU legal order, or to the institutions to which they feel loyalty, is asking for political unrest in the future.